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Supreme Court, U.S.
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No. 02-963

IN THE

Supreme Court of the United States

ALAMO TITLE INSURANCE, a member of the Fidelity National Group of Companies, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Petitioners,

v.

NICHOLAS LISANTI and GERALDINE LISANTI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

REPLY BRIEF

CHARLOTTE H. HETHERINGTON
Counsel of Record
PATRICIA SALAZAR IVES
CUDDY, KENNEDY, HETHERINGTON, ALBETTA & IVES, LLP
Post Office Box 4160
Santa Fe, NM 87502-4160
(505) 988-4476

Counsel for Petitioners

178868

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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The Respondents' Statement of the Case elaborates on the initial proceeding in the New Mexico state district court which rejected Respondents' Motion for Preliminary Injunction and Permanent Injunction Enjoining Defendants From Pursuing Arbitration and Memorandum in Support Thereof (hereinafter Respondents' Motion for Preliminary Injunction). Brief in Opposition at 8-11. Respondents assert that "the Petitioners did not dispute [the Respondents'] verified factual assertion that there was no written agreement to arbitrate." *Id.* at 11. On the contrary, the Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross Motion to Compel Arbitration and Supporting Memorandum of Points and Authorities, (hereinafter Response to Preliminary Injunction) under Point V at 6-13, addressed Respondents' claim of non-consent.

Petitioners additionally raised their status as foreign corporations doing business as title insurers in New Mexico in their Response to Preliminary Injunction under Point III at 8 and attached Certificates of the New Mexico Public Regulation Commission evidencing such status as Exhibits 2A and 2B. Petitioners' Response to Preliminary Injunction, Point II, addressed Respondents' claim in their Motion for Preliminary Injunction that a referral to arbitration would constitute a denial of due process. Petitioners advised the district court that constitutional due process protections were available under appeal provisions of the New Mexico Uniform Arbitration Act, N.M. STAT. ANN. §§ 44-7-1, *et seq.* (1971) (hereinafter NMUAA). Petitioners' Response to Preliminary Injunction at 6-7. The reference to the NMUAA for one proposition, however, has not been considered by New Mexico courts as a waiver of a right to arbitrate which may be granted under federal law. *See e.g., United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 112-113, 597 P.2d 290, 297-98 (1979) (Waiver of right to

seek arbitration could not be inferred merely from party's attempt to meet all issues raised between it and another party).[1]

Respondents' assertions in their Motion for Preliminary Injunction that their statutory claims under the Trade Practices and Frauds Act, N.M. STAT. ANN., §§ 59A-16-1, *et seq.* (1993) (hereinafter TPFA), could not be referred to arbitration were contested in Petitioners' Response to Preliminary Injunction at pages 11 and 12. Petitioners directed the district court to contrasting and more specific provisions in the New Mexico Title Insurance Law, N.M. STAT. ANN., §§ 59A-30-1, *et seq.* (1985) (hereinafter Title Insurance Law), which provide that the TPFA applies to the business of title insurance "[t]o the extent not in conflict with the Title Insurance Law." § 59A-30-14. The Title Insurance Law expressly subjects the entire business of such insurance to its provisions and to regulations of the Superintendent of Insurance. *See* §§ 59A-30-2, 59A-30-4.

Respondents' Docketing Statement in the Court of Appeals characterized the appeal as an "appeal from the December 9, 1999 Order Denying Preliminary [In]Junction and Staying Proceedings." *See* Docketing Statement at 2. A preliminary injunction does not determine controverted facts. *Insure New Mexico, L.L.C. v. McGonigle*, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (Ct. App. 2000). Petitioners, as non-movants were not burdened with the obligation to raise every ground which might affect the district court's decision to grant or deny a preliminary injunction, particularly since "[t]he object of the preliminary injunction is to preserve the status quo pending the litigation of the merits. This is quite different from finally determining the cause itself." *Id. quoting Pena v. San Juan Hosp., Inc.*, 528 F.2d

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1. In *United Nuclear*, the party seeking arbitration referred to Section 44-7-2(D) of the NMUAA and was preliminarily enjoined by the district court. After an appeal through the State Supreme Court and this Court in *General Atomic Co. v. Felker*, 436 U.S. 493 (1978), this Court held that the district court could not enjoin arbitration in other forums including the FAA. *Id.* 436 U.S. 497-498.

1181, 1185 (10th Cir. 1975); *see also United Nuclear*, 97 N.M. at 115, 597 P.2d at 300.

After the appeal had been fully briefed, the Court of Appeals re-characterized it as an appeal from the denial of a stay of arbitration under Section 44-7-2(B) of the NMUAA rather than Rule 1-066, NMRA 2001 (governing injunctions) and held that it would treat the appeal under a *de novo* review. Pet. App. 20a-21a. Thus, the State Court of Appeals reviewed the appeal under Section 44-7-19(B) of the NMUAA, which provides that an appeal "shall be taken in the same manner and to the extent as from orders or judgments in a civil action" rather than the abuse of discretion standard applicable to denials of preliminary injunctions, and treated it as an appeal from a final judgment. *Compare National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 595, 874 P.2d 798, 804 (Ct. App. 1994) (Court of Appeals reviews district court decision on preliminary injunction under abuse of discretion standard.); *see also United States Steel Corp. v. Fraternal Ass'n. of Steelhaulers*, 431 F.2d 1046, 1048 (3rd Cir. 1970) ("[A] limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts. . . .").

I. THE STATE COURT RECORD AS A WHOLE DEMONSTRATES THAT THE ISSUE OF FEDERAL PREEMPTION WAS ADEQUATELY RAISED.

Respondents assert that the lack of specific findings as to a nexus between the title policy and interstate commerce "renders the court without the ability to review the issue on appeal." Brief in Opposition at 14. Respondents rely on dicta in *Gavlik Constr. Co. v. H. F. Campbell Co.*, 526 F.2d 777 (3rd Cir. 1975). The Third Circuit in *Gavlik* noted that the lack of findings as to a statutory basis for referral of claims to arbitration did not preclude a court's referral under its inherent powers to stay proceedings. *Id.* at 784. Since *Gavlik*, federal courts which have

considered claims that specific findings are necessary for review of FAA preemption claims have consistently declined to follow its ruling. *See E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1040 n. 36 (5th Cir. 1977) ("Though no explicit finding was made, the . . . contract obviously is a transaction involving commerce, so the Act applies."); *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 239 n. 9 (3rd Cir. 1979) ("[U]nder all the circumstances of this case, we are able to decide whether the . . . contract involved commerce.") The evidence contained in the records of the district court, the Court of Appeals' Opinion describing the issue as reviewable *de novo*, and Respondents' failure to dispute Petitioners' assertion that the title policy involved interstate commerce present a sufficient totality of circumstances to permit this Court to review the issue on certiorari.

II. THE EXISTENCE OF ADEQUATE AND INDEPENDENT STATE LAW GROUNDS IS A DETERMINATION MADE BY THIS COURT.

Respondents assert that the State Supreme Court's Opinion rests on adequate and independent state grounds which are not reviewable by this Court. Brief in Opposition at 15. The inquiry into the sufficiency of the asserted state grounds is one which this Court undertakes itself. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). As this Court explained in *Davis*, "[T]he point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Davis*, 476 U. S. at 387-388. The State Supreme Court's conclusion that the Superintendent of Insurance lacked the authority to require arbitration clauses in policies of title insurance is reviewable to determine both whether there is an independent state law ground and whether such state law ground is adequate. The adequacy of the state law ground is itself a

federal question which *this* Court reviews *de novo*. *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 366 (1990).

The State Supreme Court's Opinion in this case does not clearly show that it rests on a *bona fide* separate, adequate and independent state law ground. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991). The State Supreme Court not only refused to consider the federal question, it ignored or refused to consider whether the New Mexico legislature had the power to construct a state regulatory scheme for title insurance which would permit referral of disputes between a title insurer and its insured to non-judicial forums. The State Supreme Court did not address whether the Title Insurance Law, Section 59A-30-14, was a more specific statute which would control in the face of conflicting provisions of the TPFA.

The State Supreme Court did not address whether state laws and regulations compelling arbitration of uninsured motorist claims were also invalid as outside the regulatory power of the Superintendent of Insurance and the legislature although this issue was briefed. New Mexico state court decisions have consistently upheld such state compelled arbitrations.[2]

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2. N.M. STAT. ANN. § 66-5-301(A) (1983) requires insurers to offer uninsured motorist coverage in conjunction with liability insurance. 13 NMAC 12.3.6 and 13 NMAC 12.3.17 are regulations of the Superintendent of Insurance imposing arbitration clauses in all uninsured motorist policies issued in New Mexico. The insured who purchases uninsured motorist coverage is compelled to accept an arbitration clause as a policy condition just as purchasers of title insurance accept arbitration as a policy condition. Both uninsured motorist policies and title insurance policies are contracts of indemnity. Shortly after the New Mexico Court of Appeals issued its decision in this case it issued an opinion in *Padilla v. State Farm Mut. Auto. Ins. Co.*, 131 N.M. 419, 38 P.3d 187 (Ct. App. 2002) upholding arbitration of uninsured motorist claims. After an extensive analysis of the history of New Mexico's Uninsured Motorist Act and the regulations of the Superintendent, the Court of Appeals did not invalidate

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See Petitioners' Brief-in-Chief (on Certiorari to the New Mexico Supreme Court) at 8-11. State courts may not avoid deciding federal issues by invoking rules which they do not apply evenhandedly. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). The independent and adequate analysis applies whether the state law ground is procedural or substantive. *Coleman*, 50 U.S. at 729.

Likewise, the State Supreme Court did not hold that the Superintendent's regulation was void *ab initio* as Respondents' Brief in Opposition at 15 implies.[3] Rather, it held that the "regulation requiring mandatory arbitration . . . is unenforceable." Pet. App. 15a. The State Supreme Court's holding places the arbitration clause within that category of contract clauses which are contracts of adhesion because their terms are offered on a "take it or leave it" basis. Similar arbitration clauses in contracts of adhesion have been consistently held by this by this and other federal courts to be enforceable under the FAA as Petitioners have cited in their Petition at pages 13-20. Furthermore, the State Supreme Court itself earlier acknowledged that an insured generally does not bargain for individual terms within a policy but rather "'makes only broad choices regarding general concepts of coverage, risk, and cost.'" *Loya v. State Farm Mut. Ins. Co.*, 119 N.M. 1, 5,

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(Cont'd)

the regulations. *Id.* at 422-25, 38 P.3d at 190-193. It also declined to invalidate the arbitration clause in the policy as conflicting with the TPFA, § 59A-16-20(K). *Padilla*, 131 N.M. at 425-26, 38 P.3d at 193-94.

3. *Jones v. Employment Serv. Div. of the Human Services Dept.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980), the case on which both the Court of Appeals and State Supreme Court did rely held that an agency could not by rule shorten the statutorily prescribed time for appeal from its administrative decisions. In contrast, the issues in this case relate to the legislature and Public Regulation Commission's constitutional powers to enact regulations for an industry subject to state regulation under the McCarran-Ferguson Act and the state's selection of arbitration as the choice of forum for dispute resolution.

888 P.2d 447, 451 (1994) *quoting Sanchez v. Herrera*, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989). The lack of evenhandedness on the issue of arbitrability of insurance claims in the decisions of the State Supreme Court merits review by this Court.

III. THE ARBITRATION CLAUSE DOES NOT INTERFERE WITH VINDICATION OF STATUTORY RIGHTS.

Respondents admit that the State Supreme Court's "alternative rationales" for determining the arbitration clause invalid "are subject to analysis under the FAA." Brief in Opposition at 16. Relying on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995), they claim that the state court's "treatment of them is consistent with the FAA and renders review in this court unnecessary" since the arbitration clause was unenforceable "because it interfered with vindication of statutory rights under the Insurance Code and the Unfair Practices Act." Brief in Opposition at 16. Respondents' contention is misguided because the "statutory rights" addressed in *Graham Oil Co.* are "protections and benefits" such as the right to recover exemplary damages, reasonable attorney's fees or the right to a certain statute of limitations. *Graham Oil*, 43 F.3d at 1247-48. Enforcement of the arbitration clause at issue in this case would not affect these rights even if they were part of the Respondents' claims. Statutory claims, including claims involving unfair practices, and other general contract claims may be the subject of such clauses and are enforceable under the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The arbitration clause in the title policy at issue is "nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits." *Graham Oil*, 43 F.3d at 1247. Accordingly, it is valid and is the type of agreement that "finds favor in the courts." *Id.*

Respondents apparently contend that even if the State Supreme Court's holding regarding the Unfair Practices Act was precluded by preemption under the FAA, the McCarran-

Ferguson Act "would permit the state Insurance Code to preclude enforcement." Brief in Opposition at 17. Respondents' contention is incorrect. The McCarran-Ferguson Act applies only to the "business of insurance" and to state laws "which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). This Court defined the business of insurance as "[t]he relationship between the insurer and the insured, the type of policy which could be issued, its reliability, interpretation and enforcement – these were the core of the 'business of insurance'. . . . Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance'." *S.E.C. v. National Securities*, 393 U.S. 453, 460 (1969). The Unfair Practices Act does *not* relate to the regulation of the insurance business, N.M. STAT. ANN. § 57-12-2(A), (C), (D) (1999), but provides for protection from unfair business practices in general. Accordingly, the McCarran-Ferguson Act would not preclude enforcement of the clause under the FAA with regard to the Unfair Practices Act.

The TPFA, does apply to the business of insurance, but only "to the extent not in conflict with the New Mexico Title Insurance Law." § 59A-30-14. Thus, while the TPFA permits Respondents to pursue claims in the courts, it is in conflict with the Title Insurance Law and the regulatory scheme requiring arbitration, and thus must give way to the more specific legislation and regulations. The New Mexico Constitution delegates to the Public Regulation Commission, which supervises the department of insurance, the responsibility "for regulating . . . insurance companies . . . in such a manner as the legislature shall provide." N.M. CONST. ART. XI, § 2. The New Mexico legislature declared that the business of title insurance "be totally regulated by the state." § 59A-30-2. The New Mexico Constitution as well as specific legislation and regulation established a regulatory scheme which, consistent with the McCarran-Ferguson Act and FAA, provides for arbitration of claims arising from transactions involving commerce. § 59A-30-2(A).

IV. THE FAA'S REQUIRED ENFORCEMENT OF STATE COMPELLED ARBITRATION DOES NOT ITSELF CONSTITUTE STATE ACTION.

Respondents claim that arbitration under the FAA "would itself constitute state action compelling the waiver of fundamental rights." Brief in Opposition at 18-19. Citing to *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), they further claim that "[t]his would render the constitutionality of the FAA dubious, at best." Brief in Opposition at 18-19. They thus contend, "State-mandated arbitration is better considered, as *Volt* at least suggests it should be, outside the scope of the FAA because of its involuntariness." *Id.* Despite Respondents' characterization, the FAA is a *federal* statute which does not itself require the waiver of any rights.

By quoting from *Granfinanciera*, Respondents try to couch the issue as a private right to trial by jury that cannot be abdicated. However, *Granfinanciera* makes clear that Congress may deprive parties of the right to a trial by jury: "Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, . . . the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera*, 492 U.S. at 53-54 (citations omitted). This power also applies to cases that are "integral parts of a public regulatory scheme and whose adjudication Congress [or in this case the State] has assigned to an administrative agency or specialized court of equity." *Granfinanciera*, 492 U.S. at 55 n.10. Thus, when the state legislature heavily regulates a field or industry like the title insurance industry, it is consistent with its police powers to assign resolution of disputes to a non-judicial forum.

Respondents' suggestion that the arbitration clause at issue is a coerced agreement under a *Volt* analysis is not persuasive. Brief in Opposition at 19, n.8. The federal courts have consistently treated arbitration clauses as voluntary even if the agreement itself is a contract of adhesion or includes an

arbitration clause compelled under a regulatory scheme. *See e.g., Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 572, 589 (1985). *R.J. O'Brien & Associates, Inc. v. Pipkin*, 64 F.3d 257, 261 (7th Cir. 1995) (Mandatory nature of registration in National Futures Association does not obviate consent to submit to arbitration procedures).

Applying the FAA in the context of these facts is not only appropriate, it is necessary. The FAA does not constitute state action, but rather remains a proper federal statute that requires enforcement of the arbitration clause in this case and, under principles of federal preemption, requires reversal of the State Supreme Court's opinion to the contrary.

CONCLUSION

For the reasons set forth in the Petition and this Reply, the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLOTTE H. HETHERINGTON
Counsel of Record
PATRICIA SALAZAR IVES
CUDDY, KENNEDY, HETHERINGTON,
ALBETTA & IVES, LLP
Post Office Box 4160
Santa Fe, NM 87502-4160
(505) 988-4476

Counsel for Petitioners